



POLICE DEPARTMENT

January 18, 2008

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Brian Brown
Tax Registry No. 923806
Emergency Service Unit – Truck No. 9
Disciplinary Case No. 83153/07

The above-named member of the Department appeared before me on October 10, 2007, charged with the following:

1. Said Police Officer Brian Brown, while assigned to the 70 Precinct on February 1, 2006 at approximately 2130 hours in the vicinity of [REDACTED] in Kings County, did abuse his authority as a member of the New York City Police Department in that he wrongfully and without just cause stop an individual, to wit: said Police Officer did grab the arm of a person known to this Department in order to stop and question him without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

2. Said Police Officer Brian Brown, assigned as indicated in Specification #1, at the time, date and location indicated in Specification #1, did abuse his authority as a member of the New York City Police Department in that he wrongfully and without just cause issued a summons to an individual known to the department, to wit; said Police Officer issued a summons for disorderly conduct (P.L. 240.20 (1)).

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

The Department was represented by Katie O'Connor, Esq., Department Advocate's Office, and the Respondent was represented by Stuart London, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

EVIDENCE

The Department's Case

The Department called Joseph Gill as its witness.

Joseph Gill

Joseph Gill testified that he was a 25-year-old unemployed resident of [REDACTED], which he characterized as a predominantly Jewish neighborhood, but also "mixed" in the sense that black and Hispanic people lived there too. Gill stated that he was 6'0" in height and weighed around 202 pounds, nine pounds more than he did in February 2006.

Gill stated that he had not been arrested since turning 18 years old. Since that time, however, he had been stopped perhaps over forty times by members of the Department, and between ten and fifteen times in the past two years. Most of these stops happened "in the park," or were due to "loud noise from the buildings, mistaken identity." Some were also due, Gill related, to "associating with large crowds of people. Walking outside in late night hours, early morning hours. Or maybe looking like I don't fit in any type of neighborhood." Gill asserted that he had been told by a member of the

Department that he had been stopped because of the way he looked. For example, Gill claimed, "in Bensonhurst, they feel that since I look a certain way, or certain different type of race, I'm not supposed to have friends in Bensonhurst; I can't go there at certain times." Gill also asserted that "just because I have wild hair, braids or something, and I'm hanging out at, let's say Brighton Beach and somewhere, I look like I'm going to rob a store, rob a lady, something like that." Gill contended that the police had wrongly stopped him each of these times.

Gill claimed that in the past two years, these encounters with the police had not resulted in "arrests through the system," but had resulted in him being handcuffed and "mostly assaulted," though he characterized this as being "verbally assaulted." Gill claimed that since turning eighteen until February 1, 2006, he had been physically assaulted by members of the Department about twenty times, but conceded he had never gone to the hospital about it or broken any bones. February 1, 2006, was the last day he was physically assaulted. On the one occasion he protested to the Civilian Complaint Review Board, Gill testified, he was riding a bicycle and was getting air for the tire. He had to ride on the sidewalk to get out of the gas station onto the street. Gill asserted that the police stopped him "for basically riding his bicycle on the sidewalk," but "[t]heir first excuse was me having weapons on me. So they had an opportunity to search me." When the officers failed to find anything, Gill contended, he was arrested and issued a summons for having the bicycle on the sidewalk.

Overall, Gill was "not very fond" of the Department, a feeling that had worsened since February 1, 2006; the main reason for his sentiment was that "when you ask for help, sometimes they feel you are a criminal and they go against you." He added that

“[w]hen people really need help . . . they don’t help, they would rather badger and assault, kill, injure, and I feel that’s not right.” Gill felt “not good” when he was testifying at Department Headquarters because it “annoyed” him to be “surrounded by police.” He admitted that he had a bias against police officers.

Gill testified that on February 1, 2006, he left his home at approximately 9:30 p.m. He was walking south on [REDACTED] toward [REDACTED] bored and looking for his friends so he could hang out with them. In that period, Gill was employed in construction by E&S Enterprises, where he was paid in cash and off the books.

Gill stated that at approximately 9:50 p.m., while on the sidewalk, Gill observed a large police van pull up to the corner of [REDACTED] and [REDACTED]. Gill stopped while the Respondent, who was in uniform, got out of the van, came toward Gill, and yelled something at him. Gill stated that the Respondent told him he fit the description of a robbery suspect. Gill testified he was offended that the Respondent “called him a criminal,” and told the Respondent, “What the fuck are you talking about? I didn’t rob anybody.”¹ Gill claimed that the Respondent cursed at him as well.²

Gill denied that he was moving away from the Respondent, and commented that he “had no choice” but to stop. He admitted that he was “uncooperative,” opining that “[i]f they are going to blame me for something I didn’t do, of course I’m not going to agree to it.” Gill asserted that he and the Respondent began arguing, probably due to Gill’s language, “and I guess I got him mad.” Gill claimed that the Respondent grabbed the front of his jacket and threw him onto a parked car. Gill contended that the Respondent struck him on his head and the left side of his body about five or six times.

¹ Some internal quotation marks from the transcript and from cited cases are omitted.

² Gill asserted on cross-examination that he mentioned the Respondent’s foul language on direct examination; the record does not reflect this.

Gill stated that while the Respondent hit him, Gill said, "What the fuck are you doing, why are you hitting me, I didn't do nothing."

Gill testified that after five to eight minutes, two more officers, Cedano and Stewart, arrived by car and "kind of blocked the street, by a fire hydrant." They got out of the vehicle, "[m]aybe thinking that Officer Brown has the guy that robbed someone." The Respondent "had me on top of the car," and was hitting Gill from the left side. Gill testified that he said, "What the fuck do you think you are doing? You are going to beat me up in front of these Jewish people, you don't think anyone is going to say anything?" Gill asserted that the Respondent told him that no one cared, and that Cedano told him to shut up while pushing him on top of the car.

Gill claimed that Stewart kicked him in the back, and placed his forearm against his neck while helping the Respondent slam Gill onto the car. Gill claimed that both Cedano and Stewart struck him. Gill testified that Stewart handcuffed him, relating that "while I was getting assaulted," Stewart "managed to get a handcuff on my right arm." Gill denied that he was resisting and maintained that he "was in a position" to get handcuffed. He asserted that he was using his uncuffed left arm to cover his face "so I wouldn't get punched in my face, hurt too bad in my face." It was no more than ten minutes from the time Gill was put on the car until the time he was completely handcuffed. Gill did not pay attention to whether the car was damaged. He "guess[ed]" that the officers were beating him up "for fun," and "felt that they were being stupid."

Gill admitted that he was flailing his arms and legs because "[t]hey threw me on top of the car and I had to cover my face with my arms." Gill also contended that he had

to move his legs because the Respondent was kicking them. Gill denied, however, "tussling" with the Respondent.

On cross-examination, Gill testified that he did not remember stating at his Civilian Complaint Review Board interview that he did not know who handcuffed him, and that he did not know whether that answer was accurate. At trial, Gill insisted it was Stewart who did the handcuffing.

Gill stated that he was wearing a long, heavy, "bulky" but not "puffy," camouflage-green down winter coat. He denied, however, that he would have fit the description of a "male black, heavysset," because he was not heavysset, regardless of the coat. Gill also testified that while he was being beaten, a crowd of people, "the whole neighborhood," came outside and gathered, and watched the three officers beating him.

Gill testified that after he was handcuffed, another police car came to the corner of [REDACTED]. He believed the robbery victim was inside, and she was accompanied by another officer. Gill stated that Cedano brought him to the corner, and put Gill's hood and hat on. Gill told the officers to remove his hood and hat "so the lady can see I wasn't the one who robbed her;" the officers complied. When the Respondent asked the victim if Gill was the person that robbed her, she shook her head no.

Gill stated that he said to the officers, "Look, I told you. The lady said it wasn't me, I'm hurt, you beat me up in front of all these people. I want to go home. Can you please take off the fucking handcuffs?" Gill stated that the Respondent replied that he did not like the way Gill was speaking, and he was going to arrest Gill "for the robbery and everything else." Gill responded, he believed, that the Respondent was "crazy, but

the lady just said that I didn't rob her, you are still going to arrest me. For what?" Gill admitted that he did not tell the CCRB of the Respondent's statement that he was going to arrest Gill for the robbery, stating that they did not ask him that question.

Gill testified that the Respondent told Cedano and Stewart to put him in a car and take him to the precinct. On the way there, Gill contended, Cedano and Stewart asked him why he wanted to "go through the system for something stupid like this, why can't I just take a summons and they will drop me off and I can just go home." The Respondent had not indicated an intention to give Gill a summons. Gill stated that he answered, "You guys fucked me up in front of all these people, now, you are going to give me a summons No, I want to go through the system."

Gill testified that he had been beaten up "pretty bad." When he arrived at the 70 Precinct, Gill appeared before the Desk Sergeant, had his name run for warrants, and was searched. He admitted that he did not complain to the Desk Sergeant or anyone else at the precinct about his injuries, commenting, "Why would I ask the Police Department to help me, they just beat me up." After about 25 minutes, Gill stated, the Respondent came to his cell and "announced out loud, 'let him out.'" Gill testified that the Respondent apologized, commenting "I know how it is, I am black in a Jewish neighborhood; and me outside this late, it doesn't look right." Gill stated that the Respondent related that he was only trying to do his job, asked him how he would feel if the robbery victim had been his mother, and "[a]ll this nonsense that I didn't really want to hear." Gill admitted that he "cursed [the Respondent] out," and told him "that's not right, you guys want respect, but you don't give it."

Gill testified that the Respondent told him to leave, but as he was on his way out, the Respondent stated "you're forgetting something." Gill, "checking his pockets" and seeing that he had all of his belongings, observed the Respondent "make[] another officer in the precinct write me a summons for disorderly conduct." Gill just looked at the Respondent "like, this is bullshit," took the summons, and left the precinct. He did not recall apologizing to the Respondent for the trouble he caused and shaking his hand. Gill stated that he exited the precinct around 10:15 p.m. to 10:30 p.m.

Gill maintained that he went to trial on the disorderly conduct charge, and that it was dismissed as "[e]vidence inadmissible." Gill agreed that he brought a civil action against the City of New York, the Department, the Respondent, Cedano and Stewart (see RX-A, Notice of Claim), "sort of like a speak-out for my whole neighborhood, my community. Because I'm not the only one who got assaulted by Police Officers." Gill felt that "maybe everyone else in my neighborhood is afraid to go against the police. I'm not." He "would like to be like a voice, or some sort of leader that, if you get assaulted by the police, verbally or physically, you have to do something about it, because if you don't, they feel that they are going to abuse their power and they are going to do it to everyone else." Gill agreed that in the notice of claim, he accused the officers of making "racial epithets" toward him; he considered the Respondent's statement about being black in a Jewish area to be a "racial slur." Gill had not brought a lawsuit regarding any of the prior police incidents he testified about.

Gill disagreed that he "had nothing to worry about" when the Respondent stopped him, because he was worried about "[g]etting arrested . . . assaulted, getting yelled at, screamed at, cursed at, for something that I didn't do." Gill maintained that it was "not

my job” to tell the Respondent, “I know I didn’t do anything, no problem,” and cooperate with him. Gill felt that the Respondent was blaming him for the robbery when he said he fit the description. Otherwise, Gill insisted, the Respondent “would have put me on the wall waiting for the victim to come.” He denied that the Respondent was attempting to do so, noting that he was on the corner “and the building is way over there.”

Gill conceded that he did not receive any broken bones, and did not stay overnight at the hospital. Gill testified that when Sergeant Morris came to the hospital, Gill lifted his gown and showed Morris his injuries. Gill stated that it was Morris who made the complaint to the CCRB. Gill testified that a Duty Captain also came to the hospital, and that Gill showed him his injuries.

The Respondent’s Case

The Respondent called Police Officer Joshua Stewart and Sergeant Plinnie Morris as witnesses, and he testified in his own behalf.

Police Officer Joshua Stewart

Stewart was assigned in the 70 Precinct. On February 1, 2006, at approximately 9:30 to 9:45 p.m., he was returning from Central Booking in a marked vehicle with his partner, Police Officer Johnny Cedano. Stewart was working as the recorder. The Respondent stated over the radio that he had one person stopped and was by himself. Stewart testified that he and Cedano radioed that they would respond, “because the police regulations are that they don’t want one person, you know, because stuff could happen.”

As they pulled up, Stewart testified, they observed the Respondent "having somewhat of a struggle" with Gill, a black male the Respondent had stopped and was holding by the arm. The Respondent had Gill against the car, with his front facing the car, and was trying to handcuff him. Gill was resisting arrest, flailing his arms and "pushing off the car . . . just not letting him have his arms to be placed behind his back." Cedano attempted to assist by grabbing Gill's arm, and Stewart grabbed his other arm. It took about twenty seconds to handcuff him. Stewart did not recall who handcuffed Gill; Stewart denied that it was him, but stated that he assisted in getting the cuffs on. Stewart did not have to punch or kick Gill, and he did not see any other officer punch or kick him, or throw him against the windshield or hood of a car.

Stewart testified that they found out from the Respondent and over the radio that Gill was being held for a show-up regarding a robbery. They also heard descriptive details over the radio about the perpetrator of the robbery. Another police vehicle arrived with the complainant. The Respondent walked to the car, and Stewart and Cedano stayed with Gill. Stewart noted that he did not escort Gill toward the car holding the complaining witness because "we are not supposed to see who is in the vehicle." Stewart found out over the radio that the identification was negative. The vehicle containing the complainant drove away.

Stewart did not recall a lot of people standing around, but could not say one way or the other. Stewart did not recall any civilians approach or ask what was happening. He did not "hear sounds that would lead you to believe that there were a lot of people standing around."

Stewart testified that he and Cedano took Gill to the precinct. Gill was arrested, upon the Respondent's decision, "for disorderly conduct for the actions that he made in regards to being stopped, and not letting us stop him for the description of the robbery that came over." Stewart characterized the decision not to release Gill as "mutual," but also as "solely Officer Brown." Stewart testified that the Respondent asked them to take Gill to the precinct immediately after the negative identification.

Stewart contended that there was no conversation "whatsoever" with Gill, and that neither he nor Cedano said, "Why don't you just take a discon summons and leave the car now, why do you have to go back to the precinct?" When Gill was presented in front of the Desk Sergeant, he did not complain of any injuries. The Desk Sergeant noted Gill's condition in the Command Log as "normal" (see RX-B, Command Log Entry). Stewart did not see any injuries on Gill, and he did not "complain to [Stewart] of any visible injuries."

Stewart testified that he filled out a piece of paper, gave Gill's pedigree at the desk, placed him in the cell, and left. Stewart testified that he did not know who gave Gill a summons for disorderly conduct. The Command Log noted that Gill was released at 10:15 p.m. Stewart asserted that fifteen to twenty minutes passed between the time he arrived on the scene until he presented Gill at the desk.

Stewart admitted that he reviewed his CCRB statement before testifying at trial, and had conversed on the topic with Cedano.

Sergeant Plinnie Morris

Morris was assigned in the 70 Precinct. On February 2, 2006, Morris spoke to the Desk Sergeant, who told him she had received a call from a hospital administrator, that there was an allegation of a beating by the police, and that Morris needed to respond to the emergency room of [REDACTED] Hospital. When Morris arrived at the hospital, the hospital administrator confirmed these details. Morris asked how badly the person had been beaten, but the administrator "really didn't answer me." The administrator told Morris that he had seen the person, and that he was still being evaluated.

Morris found out that the person who stated he had been beaten was named Gill. The administrator took Morris to meet Gill, and Morris, who was in uniform, told Gill that he was a Sergeant and asked him what happened. Gill seemed "very angry and a little agitated," though not really toward Morris. Gill replied, Morris believed, that he had been stopped by three police officers for a show-up, and that he wanted to leave rather than be stopped. Gill "kind of told" Morris that he was not very cooperative. The officers "physically held him, okay," and Gill "resisted." Then "[s]omeone came and saw him. Told the Police Officer it wasn't him." Gill was taken to the 70 Precinct, and while Gill "used other words," he was given a C summons regarding what happened between him and the officers on [REDACTED] and was allowed to leave. Gill then went to [REDACTED] Hospital.

Morris notified the Duty Captain and the Internal Affairs Bureau Command Center. Morris did not observe any injuries, bleeding, or broken bones on Gill. When the Duty Captain, Sariyan, arrived, he asked to see Gill's legs, and Gill complied. There were "like some scrapes, like from someone, you know, trying to grab you, whatever, on

his legs,” but Morris did not observe any bruises. Gill left the emergency room before Morris and Sariyan did. Sariyan wanted to make sure Gill received a CCRB complaint form, and Morris had to call IAB back because they wanted to know the extent of Gill’s injuries. The IAB officer told Morris that the matter probably would be referred to the CCRB. Morris did not have a CCRB form with him, but arranged for a sector to drop one off at Gill’s address.

Morris testified that he reviewed his CCRB statement before testifying at trial. He denied discussing his “testimony” with the Respondent,³ Stewart or Cedano, but acknowledged talking about the “incident” with them. Morris’s understanding was that Gill fit the description of a robbery suspect, but refused to cooperate with the Respondent, to stop and answer his questions, and to wait for the victim to be brought to view him.

Morris testified that he spoke to the Respondent when he returned from the hospital, and asked why he did not “put [Gill] through the system.” Morris stated that he would have ordered an arrest for obstructing governmental administration, resisting arrest, and disorderly conduct. He thought the Respondent had “exercised tremendous discretion,” but had been too easy on Gill in just giving the summons. The Respondent told Morris that he arrested Gill for “resisting” and preventing the Respondent from holding Gill until the witness could see him. Morris testified that he was taught that “a person’s refusal to be stopped doesn’t mean they committed the crime, but it can heighten your sense that they may have.” Morris commented that members of the Department “try to explain and try to cajole people to wait and help us so that we can find the person, especially in a serious crime like a robbery.” Thus, Morris opined, “When a person

³ Morris referred to a Police Officer Brown in his testimony but did not formally identify the Respondent.

doesn't want to help us out, is actually violent, there is no other option for us but to do that."

The Respondent

On February 1, 2006, the Respondent was assigned in the 70 Precinct as the Impact Training Officer. He had also been an Anticrime officer for four years. At approximately 9:45 p.m. that day, the Respondent was at the Precinct and received a radio transmission of a robbery in progress in the area of [REDACTED]⁴ and, the Respondent believed, [REDACTED]. The Respondent proceeded to that location, in uniform and driving a van.

Police Officer Sullivan had picked up the complaining witness, and transmitted the directional flight of the perpetrator, which was toward [REDACTED] and a description of the perpetrator, a male black (see RX-D, Sprint report). The Respondent described the Sprint report as indicating, "perps, two male blacks pulled knife on female on corner asking for money and keys, both male of unknown of age [sic], one male black heavy built, unknown what he is wearing," and that the victim was still at the location. The Respondent testified that he heard a description of the perpetrator from the radio dispatcher as "heavysset." The Respondent stated that the total description he had was "two male blacks, one heavysset, fled southbound from [REDACTED] He admitted, however, that he testified before the CCRB that the best he could recall about the description was that the perpetrator was a male black.

⁴ The transcript reads that the robbery occurred "in the vicinity of [REDACTED]." Those two avenues are not near each other in the area of [REDACTED], and my trial notes indicate that the witness stated that the location was [REDACTED]

The Respondent characterized the neighborhood in question as “diverse” and “mixed,” and comprised of white, black, Hispanic, Arab and Chinese individuals. He testified that the [REDACTED] section of Flatbush, i.e., south of Avenue J between Ocean and Coney Island Avenues, was a Jewish area, but that it had changed over the years and that the Pakistani population had quadrupled.

The Respondent testified that he canvassed the area, proceeding south on [REDACTED] and then turning east onto [REDACTED]. When he got to the corner of [REDACTED], the Respondent testified, he observed Gill proceeding south on [REDACTED]. The Respondent contended that Gill matched the description, and was the first individual he encountered on [REDACTED] male black or otherwise. It was Gill’s clothing that made him heavysset, specifically his down jacket, which “[d]efinitely added more bulk to him.” The Respondent denied ever interacting with Gill before February 1, 2006, or seeing him in the neighborhood the Respondent patrolled.

The Respondent’s window was open, and he told Gill “to stop, hang out.” The Respondent testified that Gill, who was almost ignoring him, kept walking south, into the street. Gill was not walking quickly. The Respondent believed he stated, “Hey, you, stop,” to Gill, who continued walking and inquired, “Why? What do I have to stop for?” The Respondent replied, “Don’t move, you can’t leave.”

The Respondent did not then tell Gill that he matched the description of a robbery suspect because in his experience, there was a good chance that Gill would run. The Respondent testified that he was attempting to verbally stop Gill in the hope that he would cooperate and that the Respondent could elaborate on what was happening.

The Respondent testified that as he left his vehicle, Gill stated, "Fuck you; you are always harassing me. . . . I didn't rob anyone, I didn't do anything wrong." Gill continued walking south, "pretty much" in front of the van. The Respondent, "out of courtesy," asked Gill "to stop, hang out," repeated that someone had been robbed, and told him, "If you didn't do anything wrong, you have nothing to worry about."

When Gill continued walking in front of the van, the Respondent grabbed the collar or shoulder area of Gill's coat with his left hand and said "listen, you can't leave." He testified that Gill swung around and swayed his shoulders to "try to get loose to get away from me grabbing him." Gill was "basically proceeding forward, pulling." The Respondent grabbed Gill with both hands and placed him in a bear hug from behind. The Respondent pushed Gill into the front of the police van "and held him there." The Respondent stated that "a struggle ensued," and Gill, who was "moving his feet," rolled off the front of the van into a parked car. The Respondent contended that he told Gill "just to relax" and calm down, and that "there is no need for this." Gill was saying "get the fuck off me." The Respondent agreed that he did not call for assistance, stating that he had no opportunity to do so because he was trying to restrain Gill.

After 30 to 45 seconds of restraining Gill, the Respondent testified, Cedano and Stewart arrived. One or both of them assisted the Respondent in restraining Gill, and after perhaps 10 seconds, he was handcuffed and brought to the front of a police car.

The Respondent radioed that they had stopped a male fitting the description, and requested that Sullivan respond with the complaining witness. The Respondent spoke to Sullivan and the complainant when they arrived. Cedano and Stewart brought Gill "almost between the parked car that we went into" and the police van. The Respondent

approximated that Gill was fifteen to twenty feet from Sullivan. The complainant, a female, viewed Gill, and the Respondent asked her, "Is this him?" She "scrutinized" Gill and said "she wasn't too sure." When the Respondent explained that she had to be 100 percent sure, she said, "I really don't know. . . they all look the same," and that she could not be 100 percent certain. The Respondent believed the victim was white, and Sullivan told him that there had been a language barrier on the victim's part.

The Respondent stated that it was unlikely Gill had viewed the complaining witness, since it was dark, the turret lights were on, and the headlights were in Gill's eyes. The incident occurred at night, and while "there might have been light poles," the Respondent did not recall.

After the identification procedure, the Respondent spoke with Cedano about the latter bringing Gill to the stationhouse to be arrested for disorderly conduct. The Respondent decided that Gill's acts of "being belligerent with" the Respondent and "pushing [him] away" would be the basis for an arrest regardless of whether a positive identification resulted from the show-up. The Respondent contended that when he told Gill that he had not been identified, Gill "became apologetic," and said, "I'm sorry that I fought with you. I am always being harassed by the police." Because a crowd was gathering and "we were holding up traffic," the Respondent testified, he "said we will talk about it" and "explain to him why" at the precinct. Gill was upset, the Respondent stated, at having to go to the stationhouse. He was cursing, but was not "disruptive." The Respondent denied telling Gill that he was going to arrest him for the robbery anyway.

The Respondent testified that the corner of [REDACTED] was a residential area. There were not many people around before he stopped Gill. A crowd began gathering before Cedano and Stewart arrived. Initially, four or five people were present. None of them asked the Respondent what was happening or what the Respondent was doing. Eventually, he testified, by the time the three police vehicles had arrived, there were between ten and twenty people on the street watching what was happening, but not "the whole neighborhood." They gathered "based on the commotion that Mr. Gill was making with" the Respondent, Cedano, and Stewart. After the negative identification, and the Respondent's decision to arrest Gill for disorderly conduct, there were about ten to fifteen people watching. These civilians were not "loud."

The Respondent returned to the 70 Precinct as well. He conferred with the Desk Sergeant, "told him what we had" and that Gill would be issued a C summons. The Respondent denied that Gill was bleeding or visibly injured at this time. According to the Respondent, Gill's demeanor was "solemn" and "definitely apologetic." Gill was brought from the desk to the cell area and un-handcuffed.

It was after consulting with the Desk Sergeant, the Respondent testified, that he decided to issue the summons. That Sergeant concurred with the Respondent's decision. The Respondent also considered Gill's apologetic state and his remark before being placed inside the police vehicle that "he was tired of being harassed by the police, he is always stopped because he is black" when determining to issue the summons.

The Respondent testified that he issued the summons for Disorderly Conduct pursuant to Penal Law § 240.20 (1) for Gill's "violent" conduct and "engaging in

fighting, acting in a tumultuous manner,” as well as “causing alarm” due to the crowd on the street (see RX-F, Summons).

The Respondent prepared a Stop, Question and Frisk Report (RX-E). The report indicated that Gill was stopped “for a robbery” on the street at 2153 hours for twenty minutes, that he was frisked and searched, and no contraband was found.

When the Respondent told Gill that he had to do a warrant check before issuing the summons, Gill thanked him and said he was sorry. Gill and the Respondent “debated,” with Gill relating “what it’s like to be a black male in Flatbush, you get stopped by the police,” and the Respondent replying that he understood, but that if Gill “just stopped there, you wouldn’t be in this situation.” The Respondent contended that Gill agreed, and that after checking Gill for warrants and issuing the summons, Gill shook his hand. The Respondent stated that Gill was at the precinct for perhaps ten to twenty minutes before being un-handcuffed and released.

The Respondent denied ever cursing at Gill, or kicking or punching him. He did not observe any other member of the Department punch or kick Gill. The Respondent testified that he was not “offended” by Gill’s profanity, but that it did “bother” him.

The Respondent testified that he received training at the Police Academy on “legal issues of street encounters.” He had not, however, received training on “street encounters, per se,” and admitted that he did not “know what a street encounter really is.” The Respondent was not familiar with the concept of “four levels of street encounters.” He was not aware of a portable guide titled “Street Encounters Legal Issues,” or that it was a mandatory memo book insert (see DX-1, Street Encounters – Legal Issues Sheet⁵).

⁵ This document contains a brief summary of the levels of suspicion the police need to interact with a civilian, as set forth by People v. De Bour, 40 N.Y.2d 210 (1976) and its progeny. The sheet is a mandated

He denied that it was part of the Patrol Guide. The Respondent had, however, seen variations of the concepts listed in the form “[j]ust in my personal reading. Bulletins in the precinct.” He characterized the document as “nothing more than a guide” or “summary” of the levels of suspicion.

The Respondent testified he “generally” used “the totality of the circumstances” when deciding “how to act on the street,” and that “the right to stop someone was based on the level of suspicion.” He had heard of a “common-law inquiry” and a variation of the term “request for information.” The Respondent believed that when he was in the Police Academy, there were six levels of suspicion, and that now it was nine levels. He first testified that he was not sure if a street encounter and level of suspicion were the same thing, then stated they were different concepts.

By “common-law inquiry,” the Respondent testified, he meant that he wanted “to ask the individual his whereabouts, his name.” He agreed that a civilian had the right not to comply and to walk away.

The Respondent asserted that he exercised his “common right of inquiry” in asking Gill his name, and that when Gill “became belligerent and walked away” as the Respondent “was conducting my investigation,” his level of suspicion rose from “common inquiry to real suspicion.” The Respondent contended that he had the authority to use force to detain Gill when Gill refused to stop at the Respondent’s request, and after the Respondent told Gill that there was a robbery and the victim was coming. At this point, the Respondent asserted, Gill was not free to walk away. The Respondent stated that his level of suspicion rose when Gill kept walking south on [REDACTED] and did

part of the equipment a Department member must carry while on uniformed patrol, see Patrol Guide § 204-09 (12)(g), Required Equipment, & Revision Notice 02-02 (8)(a).

not respond to him, since “[e]ven if he didn’t do anything wrong, he would have stopped.”

The Respondent testified that when Gill failed to cooperate, and “started fighting with me and resisting arrest, or tried to get away from me,” his level of suspicion rose to probable cause. Also adding to his level of suspicion, the Respondent testified, was that there was no one else on the street, and “[i]t was February, freezing out.” Gill’s refusal to stop, combined with the Respondent’s exhortation that someone had been robbed and that Gill had nothing to worry about if he were innocent, led the Respondent to believe that “criminality was afoot.”

The Respondent testified that he had no interaction with Gill since the incident. The Respondent transferred from the 70 Precinct in October 2006 to the Emergency Service Unit.

FINDINGS AND ANALYSIS

Specification No. 1

The Respondent is charged in the first specification with conducting a forcible stop of Joseph Gill without sufficient legal authority. It is not disputed that there was a forcible detention of Gill. The Respondent admitted that he believed he had the requisite legal basis to hold Gill at the corner [REDACTED], Brooklyn, for purposes of conducting a show-up identification procedure with a robbery complainant. Because I find that the Respondent’s stop of Gill, and grabbing of Gill’s body to effectuate that stop, was done with sufficient legal authority, I find the Respondent Not Guilty of Specification 1.

Reasonable suspicion is the required standard for a police detention of a suspect short of an actual arrest. People v. Pines, 99 N.Y.2d 525, 527 (2002). Reasonable suspicion consists of a level of knowledge which would lead an “ordinarily prudent and cautious” person, see People v. Cantor, 36 N.Y.2d 106, 112-13 (1975), under the circumstances, to believe a crime has been, is being, or is about to be committed. See People v. Roque, 99 N.Y.2d 50, 54 (2002).

The Department argued at trial that the Respondent possessed at most an articulable reason to approach Gill for information, also known as a Level I inquiry under People v. De Bour, 40 N.Y.2d 210 (1976), the seminal New York Court of Appeals case on encounters between law enforcement and citizens. The Department, however, provided no authority in support of their proposition. Substantial case law exists, on the other hand, to support the conclusion that a forcible stop of Gill was permitted under the circumstances.

The stop occurred about five street-length blocks and one avenue-length block from the location of the robbery, not long after the 911 call was made (see RX-D, Sprint report).⁶ Cf. People v. Tatum, 39 A.D.3d 571 (2d Dept.) (police had reasonable suspicion to detain defendant for show-up in light of, inter alia, defendant’s spatial and temporal proximity to robbery), lv. denied, 9 N.Y.3d 851 (2007); People v. Wiley, 32 A.D.3d 1352 (4th Dept.) (police had reasonable suspicion to stop and detain defendant for identification procedure where, inter alia, defendant was stopped about five blocks from

⁶ The Stop, Question and Frisk Report (RX-E), prepared by the Respondent, indicates that Gill was stopped at 9:53 p.m. Gill similarly testified that he was stopped after 9:50 p.m. The Sprint report, however, indicates that one male was stopped at the corner of East 18th Street and Avenue M at 9:35 p.m. Similarly, Gill’s Notice of Claim (RX-A) alleges that he was on Avenue [REDACTED] streets at about 9:30 p.m. Finally, the Command Log (RX-B) denotes that Gill was brought into the Precinct at 9:52 p.m. Thus, I believe that Gill was actually stopped approximately eleven minutes after the victim’s 911 call, at approximately 9:35 p.m.

burglary scene), lv. denied, 7 N.Y.3d 930 (2006); People v. Hunt, 306 A.D.2d 497 (2d Dept. 2003) (defendant was found within close proximity to scene of the crime shortly after it occurred). There is no bright-line rule to determine how close in time is “close enough,” but it should be noted that here, there was an ongoing and continuous investigation in which the perpetrators of the robbery had not been apprehended. See People v. Jones, 2004 NY Misc. Lexis 2945, *3 (slip op. 51782U, Sup. Ct., Bronx County, Nov. 30, 2004).

Additionally, the Respondent testified that Gill was the first person he encountered on Avenue N. This is not implausible, as it was almost 10:00 p.m. on a cold weekday evening.⁷ Cf. People v. Armsworth, 27 A.D.3d 571 (2d Dept.) (police had reasonable suspicion to detain defendant where, inter alia, he was the only person in the vicinity where victim said perpetrator had fled), lv. denied, 7 N.Y.3d 752 (2006); People v. Schollin, 255 A.D.2d 465 (2d Dept. 1998) (there was reasonable suspicion to believe defendant was involved in a known crime where, inter alia, he was present around the time of its commission when the streets were otherwise deserted). Moreover, Gill’s own account of the neighborhood’s demographics supports a finding that Gill was at the very least the first black person the Respondent observed. Also, the Department stated in their opening statement that the Respondent “stopped the first black male that he saw near Avenue N between 17th and 18th Street.”

Gill’s walking south on East 18th Street was not exactly consistent with the transmission that the perpetrators of the robbery fled south on East 13th Street toward Avenue N because, had Gill been the perpetrator, he really would have had to turn east

⁷ Gill believed February 1, 2006, was perhaps a Tuesday or Wednesday; I will take notice that it was a Wednesday.

(left) onto Avenue N, then north (left) onto East 18th Street, and then would have had to turn around and come back the other way. Gill's location was, however, generally consistent with the complainant's description of where the robbers had gone. See People v. Nation, 13 A.D.3d 128 (1st Dept. 2004) (defendant was found in location consistent with flight path); People v. Portis, 2005 NY Misc. Lexis 2523 (slip op. 51838U, App. Term, 1st Dept., Nov. 15, 2005) (same); cf. People v. Plato, 247 A.D.2d 317 (1st Dept. 1998) (defendant was observed four to five blocks away from scene of crime, with two others, walking in same direction as robbers reportedly took).

Furthermore, Gill matched the description given by the victim, so the Respondent, acting in an ordinarily prudent and cautious manner, had reason to believe that Gill had committed the robbery. The description must be sufficiently specific to engender a prudent and cautious belief that a certain person committed the offense in question. See Nation, 13 A.D.3d at 128; Portis, 2005 NY Misc. Lexis at 2523. That does not mean, however, that a more general description is insufficient. See People v. Owens, 39 A.D.3d 1260, 1261 (4th Dept.), lv. denied, 9 N.Y.3d 849 (2007); Tatum, 39 A.D.3d at 571; but cf. People v. Vincente, 100 A.D.2d 789 (1st Dept.) (opining that a description of male Hispanic with tan jacket was "almost non-specific" on a Spanish Harlem street), aff'd, 63 N.Y.2d 745 (1984). Rather, the totality of the circumstances and the information possessed by the officer should be examined to determine whether the person was justifiably stopped. See Owens, 39 A.D.3d at 1261; Nation, 13 A.D.3d at 128; Hunt, 306 A.D.2d at 497.

Gill, an African-American, is six feet tall and weighed 192 pounds on the date of the encounter. He agreed that the coat he wore was "bulky" and "heavy," although he

denied this made him “heavysset.” The coat itself was not produced at trial. I find that it would not be unreasonable to describe Gill as heavysset considering the coat he was wearing. In light of the facts that Gill was the only black male encountered by the Respondent at a time when the streets were generally empty, and that Gill was walking relatively close to the scene of the robbery, he would have been justified in concluding that he had reasonable suspicion to stop and detain Gill.

It is possible that reasonable minds could differ on this conclusion.

Notwithstanding the Patrol Guide insert (DX-1), De Bour and its progeny are not easily synthesized, if only for the reason that the case has been the basis of “likely thousands” of judicial decisions since it was issued over thirty years ago. See People v. Moore, 6 N.Y.3d 496, 499 (2006). Its capacity to engender debate, to say the least, is well-recognized. See People v. Quinones, 2007 NY Misc. Lexis 865, *1 (slip op. 50469U, Crim. Ct., N.Y. County, Jan. 25, 2007) (collecting cases). Because the Respondent’s actions were objectively reasonable under New York law governing forcible detention of suspects, I find that the Respondent’s actions were not wrongful and not without just cause. As such, I find him Not Guilty of Specification Number 1.

Specification No. 2

The Respondent is charged in the second specification with abuse of authority by issuing Gill a summons, wrongfully and without just cause, for disorderly conduct after Gill was not identified as the perpetrator of the robbery. The Department argued that the summons was issued in bad faith, and that there was no probable cause to support the charge. I disagree on both counts.

The Department contended that Gill received the disorderly conduct summons “because of his attitude and because Officer Brown was bothered by his language and behavior.” In one sense, this is correct: Gill’s belligerent manner during the incident led to his arrest for disorderly conduct. I find, however, that the Respondent made that arrest, and subsequently issued a summons instead, not as some kind of personal punishment to Gill for “bothering” him, but because Gill committed a Penal Law offense through his actions. I observed the Respondent’s demeanor at trial, and I do not view him as someone who would gratuitously issue a summons simply because Gill made him mad.

I also find that the summons was supported by probable cause. A member of the Department possesses probable cause to make an arrest when he has knowledge of facts and circumstances “sufficient to support a reasonable belief” that an offense was or is being committed. People v. Maldonado, 86 N.Y.2d 631, 635 (1995). The section Gill was charged with, Penal Law § 240.20 (1), states that a person is guilty of Disorderly Conduct when, “with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,” he “engages in fighting or in violent, tumultuous or threatening behavior.” Gill struggled with the Respondent, Cedano and Stewart in an effort to avoid being detained for the show-up – or because he simply wanted to be uncooperative for its own sake. As he was doing so, a crowd of onlookers was gathering, a fact testified to by both Gill and the Respondent. These facts and circumstances gave the Respondent sufficient reason to believe that Gill was engaging in tumultuous conduct with the officers, with the intent to cause public inconvenience, annoyance or alarm, or at the very least recklessly created the risk thereof. See People v. McDermott, 279 A.D.2d

361 (1st Dept. 2001) (defendant's obstreperous behavior on Manhattan street corner gave police probable cause to conclude his intent to cause public inconvenience, annoyance or alarm); People v. Welch, 289 A.D.2d 936 (4th Dept. 2001) (when police approached defendant after observing hand-to-hand drug transaction, and defendant became loud and abusive and used obscene language as crowd formed, probable cause to arrest for disorderly conduct was established); People v. Shapiro, 96 A.D.2d 626 (3d Dept. 1983) (ample evidence in record to support conclusion of SUNY Oneonta public safety officers that student-defendant intentionally engaged in, or recklessly created risk of, public inconvenience, annoyance or alarm, by defendant's raucous and disruptive behavior toward the officers, including use of obscene language, obstructing officers' vehicle, and pounding it with his fist).

It must be kept in mind that the question is not whether public inconvenience was proven beyond a reasonable doubt, but whether the Respondent reasonably could have believed that Gill's conduct constituted such a disturbance. See People v. Early, 85 A.D.2d 752 (3d Dept. 1981). Thus, a situation might arise where the crowd has gathered just out of curiosity or amusement in seeing someone get arrested, see People v. Pritchard, 27 N.Y.2d 246, 248-49 (1970), or where there is a dispute among individuals where others are watching, see People v. Munafo, 50 N.Y.2d 326, 331-32 (1980). Again, however, the operative question is whether the Respondent had probable cause to make an arrest for disorderly conduct, not whether such a charge eventually was proved beyond a reasonable doubt. Compare, e.g., Pritchard, 27 N.Y.2d at 248 (after trial, there was no indication in record that in gathering around two youths fighting, the crowd was "moved by anything more than curiosity or whatever entertainment value the incident afforded")

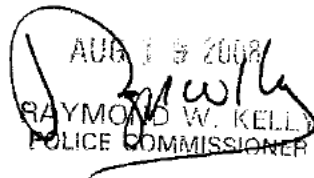
with People v. Brunner, 248 A.D.2d 241 (1st Dept. 1998) (probable cause existed to arrest defendant for Penal Law § 240.20 [1] where he fought with another in the middle of a street while crowd watched). Because the Respondent possessed probable cause at the time he made the arrest, and because the arrest was not done in bad faith or as punishment for angering a member of the Department, the subsequent summons was not wrongful or without just cause. Accordingly, I find the Respondent Not Guilty.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner, Trials

APPROVED



AUG 1 9 2008
RAYMOND W. KELLY
POLICE COMMISSIONER